No. 13140

In the United States Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

HOWELL CHEVROLET COMPANY, RESPONDENT

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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INDEX

AUTHORITIES CITED

994290—52——1

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This reply brief is directed to two of the points discussed in respondent's brief, namely, Point V—the contention that the Board improperly set aside the election, and Point VI—the contention that the trial examiner was biased and failed to afford respondent a fair hearing.[1]

[1] We here wish to make brief reference, however, to one aspect of another of respondent's contentions—that which concerns the supervisory status of Foreman Ogen (Bd. Main Br., 15–17, Resp. Br., 17–20). Respondent relies (Br. 18, n. 3) on that portion of the Senate Report (No. 105 on S. 1126) which cites *Endicott Johnson Co.*, 67 N. L. R. B. 1342, 1347, as a case where the Board held that certain "persons having title of foreman and assistant foreman but with no authority other than to keep production moving" were not supervisory employees. As it happens, the employees in the *Endicott* case had neither title of "foreman or assistant foreman," but were referred to in the Board's decision as "so-called 'supervisory employees'." While the Board would

I

Respondent contends in Point V of its brief (pp. 31–34) that because the Union did not withdraw its representation petition (filed at the same time the Union initially requested respondent to bargain) and participated in the election, it waived, as a basis for objection to the election, the unfair labor practices which occurred, with its knowledge, between the time of the filing of the petition and the holding of the election. Respondent's position appears to be that until the Board resolved the question of representation assertedly involved in the proceeding initiated by the Union under Section 9 (c) of the Act,[2] respondent could not properly recognize any union as the exclusive bargaining representative of its employees, and that the only "resolution" possible was that which accorded with the tally of the ballots cast in the elec-

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be the first to assert that mere nomenclature is not conclusive, respondent seems to have missed the clear distinction between a self-serving declaration and an admission against interest. Of course, an employer may not foreclose the right of *others* by the use of a title which falsely describes a person's duties, but neither is he in a position to discount the inference flowing from his voluntary act of according a person a rank and title clearly connoting supervisory duties and responsibilities.

[2] Section 9 (c) of the Act, in pertinent part, reads as follows: "Whenever a petition shall have been filed * * * alleging that a substantial number of employees wish to be represented for collective bargaining and that their employer declines to recognize their representative * * *, the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. * * * If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof."

tion showing the Union to have polled less than a majority. This inference, so respondent argues, flows from the Union's action in pursuing the representation proceeding through to the election instead of filing unfair labor practice charges with the Board, thus "waiving" the unfair labor practices as a basis for objection to the election. But this contention overlooks the distinction between proceedings involving a *bona fide* representation question and those discovered as a result of later employer misconduct never to have involved a genuine question in the first instance.

The Board's policy with respect to the latter type of case, of which the instant case is an example, is discussed in its decision in *M. H. Davidson Company,* 94 N. L. R. B. No. 34.[3] There the Board pointed out that the "waiver" proposition under discussion has been applied by the Board only in those cases in which a *bona fide* question of representation, within the meaning of Section 9 (c) of the Act, was raised by the employer's rejection of the union's bargaining request because the employer had a good faith doubt as to the union's claimed majority status. When the union thereupon files a petition under Section 9 (c) the statutory machinery for determining the employees' choice of representatives begins to operate.[4] In

[3] Since Volume 94 of the Board's decision is not yet in print we have reproduced in the Appendix hereto both the majority and minority opinions in the *Davidson* case.

[4] When a petition is filed under Section 9 (c) "alleging that a substantial number of employees wish to be represented for collective bargaining and that their employer declines to recognize their representative," the Board, through a Regional Director, makes a preliminary investigation to determine whether there is

such a case, where the employer commits unfair labor practices subsequent to the union's filing of the petition but the union "did [not] file any unfair labor practice charges * * * [but] instead * * * took its chances, preferring to await the result of the election," the Board has held that the union is bound by the election results and may not upset them by belatedly pointing to the employer's improper conduct of which it had knowledge prior to the election. *Denton Sleeping Garment Mills, Inc.*, 93 N. L. R. B. 329, 330, and cases there cited.

The Board finds this so-called "waiver" rule inapplicable, however, in cases where, as here and in *Davidson, supra,* the "question" which gave rise to the whole election proceeding turns out to be no question at all because the employer's challenge of the union's initial bargaining request was not based upon a good faith doubt as to the union's asserted majority status. As the Board held in the *Davidson* case:

> * * * to apply the waiver doctrine here, would require complete disregard of the Board's obligation to enforce the public policy

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"reasonable cause to believe that a question of representation affecting commerce exists" (Section 9 (c) of the Act). If the investigation discloses such "reasonable cause" the Board conducts a hearing to make a definite determination whether "such a question of representation exists." If the Board finds that no question exists it dismisses the petition. If it finds that a question does exist, it orders an election to resolve it, and certifies the election results. It is plain that under the very terms of the statute the mere filing of a petition does not automatically raise a "question concerning representation." *Ensher, Alexander & Barsoom*, 74 N. L. R. B. 1443, 1444–1445. Cf. *N. L. R. B.* v. *Flotill Products, Inc.*, 180 F. 2d 441 (C. A. 9); *N. L. R. B.* v. *The Standard Steel Spring Co.*, 180 F. 2d 942, 945–946 (C. A. 6).

against those refusals to bargain which are successful in inducing a union to file a petition—and in inducing the Board, in the representation proceeding, to find a question of representation—in the mistaken belief that a question of representation had in fact arisen. Here, the unfair labor practice which initiated the election did not occur after a genuine question of representation had arisen, but was the very refusal to bargain which induced both the Union and the Board to conclude, albeit erroneously, that such a question had arisen, and which induced the filing of the petition. In such a situation the Board's statutory obligation to prevent refusals to bargain and to enforce the public policy enunciated by the Act[6] is paramount. The Board cannot permit a possible waiver by a private party to overrule this policy.[5]

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[6] See *Radio Corporation of America*, 74 N. L. R. B. 1729, where the employer argued that the election should not be invalidated despite its own extensive unfair labor practices, because the Union knew of these practices before the election but nevertheless chose to proceed with the election. In rejecting this argument, the Board pointed out that the employer was trying to immunize "*its own wrongful conduct*" (emphasis in original). Mr. Reynolds' dissent appears to have hinged upon what he considered the Union's "abuses of the Board's process," a conclusion not supported by the record in *this* case.

Similarly, the Board has declined to give effect to other restrictions upon collective bargaining when outweighed by the policy of protecting the statutory rights of employees. See *Bethlehem Steel Co.*, 89 N. L. R. B. 132, and cases cited therein; *J. J. Newberry Co.*, 88 N. L. R. B. 947.

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[5] Although the Union in the present case filed its petition on the same day that it mailed its bargaining request to respondent

In the instant case the Board certainly cannot be said to have acted arbitrarily in following the policy it did, and in refusing to permit respondent to use the representation proceeding as a protection for its unlawful refusal to bargain and its subsequent outright campaign to destroy the Union's majority (Bd. Main Br., 20–22). Clearly applicable is *Joy Silk Mills, Inc.* v. *N. L. R. B.*, 185 F. 2d 732 (C. A. D. C.), certiorari denied, 341 U. S. 914, upon which the Board relied (R. 62, n. 14). There the Court said (185 F. 2d, at p. 741):

> When, however, such refusal is due to a desire to gain time and to take action to dissipate the union's majority, the refusal is no longer justifiable and constitutes a violation of the duty to bargain set forth in Section 8 (a) (5) of the Act. [Citing cases.] The Act provides for election proceedings in order to provide a mechanism whereby an employer acting in good faith may secure a determination of whether or not the union does in fact have a majority and is therefore the appropriate agent with which to bargain. Another purpose is to insure that the employees may freely register their individual choices concerning representation. Certainly it is not one of the purposes of the election provisions to supply an employer with a procedural device by which he may secure the time necessary to defeat efforts toward organization being made by a union.

(R. 21), the applicable principle is the same. It remains that respondent's bad faith refusal to bargain gave rise to the false "question" which was the basis for the representation proceeding.

See also the discussion in our main brief at pages 20–22.

Respondent's contrary contention, that the Board should not have set the election aside here, but should have found on the basis of the election that the Union had no majority, and that therefore respondent was under no obligation to bargain with it, is borrowed almost entirely from Member Murdock's dissent in the *Davidson* case, *supra*. Respondent's argument, however, overlooks the plain fact that the disagreement between the majority and the dissent concerned only the choice between alternative policies, each being plainly within the framework of a reasonable exercise of the Board's discretion.[6]

II

Respondent's claim that the trial examiner did not accord it a fair hearing is without substance. Examination of the record at the places which respondent cites at pages 34 and 35 of its brief, far from showing any impropriety on the part of the trial examiner, demonstrates that he was conscientious in carrying out his function as presiding officer and properly alert to protect the record against uncertainty and

[6] *N. L. R. B.* v. *John Deere Plow Co.*, 187 F. 2d 26 (C. A. 5) (Resp. Br. 32), is not in point. What was involved there was not a finding of a bad faith refusal to bargain at the *outset*, but at a later stage in the representation proceedings when the union, after losing the election, again demanded bargaining in the face of the fact that the Board had not yet passed on its objections to the election. The dissenting view there was that, under the circumstances, it was not bad faith for the employer to reject the bargaining request at that stage. See 82 NLRB 69, 70–72, 75.

994290—52——2

ambiguity. "It is the function of an examiner, just as it is the recognized function of a trial judge, to see that the facts are clearly and fully developed. He is not required to sit idly by and permit a confused or meaningless record to be made." *Bethlehem Steel Co.* v. *N. L. R. B.,* 120 F. 2d 641, 652 (C. A. D. C.); *N. L. R. B.* v. *Baldwin Locomotive Works,* 128 F. 2d 39, 46 (C. A. 3); *N. L. R. B.* v. *Franks Bros. Co.,* 137 F. 2d 989, 991 (C. A. 1), affd., 321 U. S. 702.

Moreover, even assuming *arguendo* that, as respondent claims (Br., 34, 36–37), the trial examiner "quite uniformly credit[ed] testimony favorable to the charges and as uniformly discredit[ed] testimony opposed," the trial examiner is not thereby shown to have been biased and prejudiced against respondent. In *N. L. R. B.* v. *Pittsburgh Steamship Co.,* 337 U. S. 656, the Supreme Court reversed the holding of the lower court which had found that such a circumstance in itself showed bias. The Supreme Court said (p. 659):

> We are constrained to reject the court's conclusion that an objective finder of fact could not resolve all factual conflicts arising in a legal proceeding in favor of one litigant. The ordinary lawsuit, civil or criminal, normally depends for its resolution on which version of the facts in dispute is accepted by the trier of fact * * * Accordingly, total rejection of an opposed view cannot of itself impugn the integrity or competence of a trier of fact.

Accord: *United States* v. *Yellow Cab Co.,* 338 U. S. 338, 341; *N. L. R. B.* v. *Robbins Tire & Rubber Co.,*

161 F. 2d 798, 800 (C. A. 5). See also *N. L. R. B.* v. *Auburn Foundry,* 119 F. 2d 331, 333, C. A. 7).

CONCLUSION

It is respectfully submitted that the record amply reveals that the Board's findings are supported by substantial evidence, that respondent received a full and fair hearing and that the Board's order should be enforced in full, as prayed in the Board's petition for enforcement.

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MARCH 1952.

APPENDIX

United States of America

Before the National Labor Relations Board

Cases Nos. 1–CA–483, 1–RC–969

In the Matter of the M. H. Davidson Company *and* International Printing Pressmen and Assistants' Union of North America, AFL

DECISION AND ORDER

On July 21, 1950, Trial Examiner Arthur Leff issued his Intermediate Report in the above-entitled proceedings, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it be ordered to cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. The Trial Examiner also found that the Respondent had not engaged in certain other unfair labor practices and recommended dismissal of the allegations of the complaint relating thereto.[1] It was further recommended that the Board sustain the objections to the election which was held on July 22, 1949, set aside the election, and dismiss the petition in Case No. 1–RC–969. Thereafter, the Respondent filed exceptions to the Intermediate Report, and a supporting brief.

[1] As no exception has been filed to this recommendation, we shall dismiss the allegations in the complaint relating to these unfair labor practices.

94 N. L. R. B. No. 34.

The Board [2] has reviewed the rulings of the Trial Examiner at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the brief and exceptions, and the entire record in the case and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner,[3] with the following amplification.

The Trial Examiner found, and we agree, that on and after April 11, 1949, the Respondent refused to bargain collectively with the Union in violation of Section 8 (a) (1) and (5) of the Act, and that the subsequent election of July 22 did not represent the free and uncoerced choice of the Respondent's employees and should be set aside. Shortly before April 11, the Union, having been designated by a majority of the employees in the appropriate unit described in the Intermediate Report, wrote to the Respondent, requesting a collective bargaining conference. Upon receiving this letter on April 11, the Respondent replied, in bad faith as its later conduct disclosed, that it doubted the Union's majority claim and declined to bargain collectively as requested.

At the same time, the Respondent promptly embarked on an extensive campaign of further unfair labor practices directed against its employees' right to bargain through the Union, as set forth in detail in the Intermediate Report. This campaign included

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[2] Pursuant to the provisions of Section 3 (b) of the Act, the Board has delegated its powers in connection with this case to a three-member panel.

[3] The Intermediate Report contains an inadvertent inaccuracy in that it states that "* * * the Respondent, as a matter of standard procedure, did not, at least until July 12, 1945, delete the union affiliation question from its job application forms." The date should be July 12, 1949. The Intermediate Report is hereby corrected accordingly.

questioning employees concerning their union membership and activity and their intended vote at the coming Board election, repeatedly threatening reprisals for supporting the Union, promising benefits for rejecting the Union, and finally discharging two employees because of the Union. The election resulted in five votes for and six against the Union, with two ballots challenged. On November 14, the Regional Director issued a Report, stating that his investigation of objections to the election had disclosed apparent unlawful interference by the Respondent, and recommending that the Board hold a hearing thereon.[4]

No exceptions were filed by Respondent to the Regional Director's report.—Accordingly, the Board on November 25, 1949, adopted the report and directed that a hearing be held on the objections. Thereafter, the General Counsel issued a complaint against the Respondent alleging a preelection violation of Section 8 (a) (5), and violations of other provisions of the Act. The General Counsel also issued a notice of consolidated hearing on the complaint and the objections. After a full hearing in which the Respondent participated, the Trial Examiner on July 21, 1950, issued his Intermediate Report, as stated above, sustaining the 8 (a) (5) and many of the other allegations, and recommending that the election be set aside.

Absent the representation proceeding, uniform Board policy, as detailed in the Intermediate Report, would be to reject the Respondent's expressed doubt of the Union's majority, because of the bad faith with which it was asserted, and to find a violation of the Act. Nor does the dissenting opinion dispute this

[4] The Regional Director further recommended that the challenges await disposition of the objections.

wise policy. It appears to argue, however, that the Union waived its right to complain of the Respondent's unlawful conduct by proceeding to an election with knowledge of that conduct, that the election was valid because the Board would not thereafter permit the Union to withdraw its waiver; and that the Respondent's earlier unlawful refusal to bargain is therefore beyond the Board's reach. We think this a misapplication of the Board's "waiver" principle. Those cases in which the Board has applied that principle[5] have assumed the existence of a *bona fide* question of representation; no questions of the employer's prior good faith in challenging the union's majority have been raised or litigated. Here, the basic issue is whether there was any genuine question of representation at any time. The Respondent's actions here demonstrate the bad faith of its original challenge of the Union's majority. We hold that, the Respondent's challenge of the Union's majority on April 11 having been in bad faith, no genuine question of representation was raised. We therefore regard the election as a nullity.

Furthermore, to apply the waiver doctrine here, would require complete disregard of the Board's obligation to enforce the public policy against those refusals to bargain which are successful in inducing a union to file a petition—and in inducing the Board, in the representation proceeding, to find a question of representation—in the mistaken belief that a question of representation had in fact arisen. Here, the unfair labor practice which vitiated the election did not occur after a genuine question of representation had arisen, but was the very refusal to bargain which induced both the Union and the Board to conclude,

[5] *Denton Sleeping Garment Mills, Inc.*, 93 N. L. R. B. No. 47, and cases cited therein.

albeit erroneously, that such a question had arisen, and which induced the filing of the petition. In such a situation the Board's statutory obligation to prevent refusals to bargain and to enforce the public policy enunciated by the Act[6] is paramount. The Board cannot permit a possible waiver by a private party to overrule this policy.

Although the dissent alludes to the *John Deere* case,[7] we find it clearly distinguishable. Here no question concerning representation was pending at the time when the Respondent unlawfully refused to bargain collectively with the Union. On the contrary, it was only *thereafter* that the Respondent prevailed upon the Union to file its representation petition. We believe that in these circumstances the governing precedent is *Joy Silk Mills, Inc.*, 85 N. L. R. B. 1263, where Members Reynolds and Murdock joined in the 8 (a) (5) finding which the Court of Appeals for the District of Columbia subsequently enforced.[8]

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[6] See *Radio Corporation of America*, 74 N. L. R. B. 1729, where the employer argued that the election should not be invalidated despite its own extensive unfair labor practices, because the Union knew of these practices before the election but nevertheless chose to proceed with the election. In rejecting this argument, the Board pointed out that the employer was trying to immunize "*its own wrongful conduct*" (emphasis in original). Mr. Reynolds' dissent appears to have hinged upon what he considered the Union's "abuses of the Board's process," a conclusion not supported by the record in *this* case.

Similarly, the Board has declined to give effect to other restrictions upon collective bargaining when outweighed by the policy of protecting the statutory rights of employees. See *Bethlehem Steel Co.*, 89 N. L. R. B. 132, and cases cited therein; *J. J. Newberry Co.*, 88 N. L. R. B. 947.

[7] *N. L. R. B.* v. *John Deere Plow Company*, 27 L. R. R. M. 2348 (C. A. 5, February 13, 1951), vacating 82 N. L. R. B. 69 with respect to the 8 (a) (5) finding.

[8] 185 F. 2d 732.

[Provisions of Board's Order omitted.]

Signed at Washington, D. C., May 2, 1951.

[SEAL] PAUL M. HERZOG,
Chairman,
PAUL L. STYLES,
Member,
National Labor Relations Board.

ABE MURDOCK, *Member,* dissenting in part:

I disagree with the conclusion of the majority that the Respondent violated Section 8 (a) (5) of the Act in refusing to bargain with the Union as the exclusive representative of its employees on and after April 11, 1949.

On April 9, 1949, the Union wrote the Respondent, claiming to represent a majority of the employees in the appropriate unit and requesting a bargaining conference. Two days later the Respondent's president orally advised the Union that he did not believe the Union had a majority and would have nothing to do with it. On the same day the Union filed the petition in Case No. 1–RC–969. On June 29, 1949, after an investigation and formal hearing, the Board issued its decision in that case in which it found that a question of representation existed and directed an election to resolve that question. Thereafter on July 22, 1949, an election was held in which five votes were cast for the Union, six against, and two votes were challenged. On July 28, 1949, the Union filed the charges in this proceeding and on the next day filed objections to the election based on the facts alleged in these charges. Meanwhile, at various times from March 1949 through at least July 12, 1949, the Respondent engaged in illegal acts of interference and discrimination.

Thus it appears that, after a full and formal hearing in a representation proceeding, the Board found

a question of representation existed concerning the employees here involved and directed an election. The effect of a finding of unlawful refusal to bargain in this proceeding is to penalize the Respondent for having previously arrived at the same conclusion. In the light of the existence of a representation question, as found by the Board, I am unable to accept, as do my colleagues, the Trial Examiner's implicitly contrary conclusion of law that "On April 11, 1949, International Printing Pressmen and Assistants' Union of North America, AFL, was, and at all times since has been, the exclusive representative of all employees in the appropriate unit for the purpose of collective bargaining within the meaning of Section 9 (a) of the Act." The Union itself when it filed its representation petition indicated its conviction that a question of representation existed which ought to be resolved by an election. As evidenced by its support of the petition through the Board's processes of investigation, hearing, election and objections to the election, the Union apparently still retains that conviction.

My view in this matter is supported by the recent decision in *N. L. R. B.* v. *John Deere Plow Company,* 27 L. R. R. M. 2348 (C. A. 5, February 13, 1951). The court there, expressly adopting the dissenting opinion of Member Reynolds and myself, refused to enforce a Board order to bargain rendered in circumstances similar in essential elements to those appearing here. In that case, Member Reynolds and I stated: "We have been under the impression that if any legal proposition could be said to represent well-established Board doctrine, it is the proposition that so long as there exists an unresolved question concerning representation there can be no exclusive bargaining representative, and hence no legal obligation to bargain." That principle is applicable here with even

stronger force. In the *John Deere* case the parties had agreed to a consent election. Here, the Board itself after formal hearing found the existence of a question of representation.

Besides the basic legal inconsistency in the result reached by the majority there are other considerations which impel me to disagree with that result. After the Respondent's refusal to bargain, the Union had one of two courses of action open to it to establish officially its status as bargaining agent: it could have filed 8 (a) (5) charges or instituted a representation petition. It chose the latter course. I do not mean to imply that the Union should be considered to have bound itself irrevocably to follow the procedure it first initiated. Had it sought a withdrawal of its petition at an appropriate time, the Board would in all likelihood have granted the request. But the Union did not do this. Instead it supported its petition through a hearing and an election. During this period, up to about 2 weeks before the election, the Respondent was engaging in the acts complained of by the Union in the complaint proceeding. The Union certainly knew of the Respondent's refusal to bargain and also must have known of the overt acts of interference and discrimination. Yet at no time before the election did the Union protest the activity of the Respondent nor file charges based on that activity. Rather, it chose to await passively the results of the election. In similar circumstances the Board has held that the Union could not thereafter raise as objections to the election the acts of the Employer of which it had knowledge.[10] That principle is controlling here with the result that the election in Case No. 1–RC–969 must be considered to be a valid and effective elec-

[10] *Denton Sleeping Garment Mills, Inc.*, 93 N. L. R. B. No. 47, and cases cited therein in footnote 3.

tion. Having chosen to participate in such election as a means to establish its bargaining status, the Union should not thereafter be allowed to recant and seek to pursue a remedy it previously chose to ignore. Nor should the Board disavow a valid election conducted under its auspices and proceed to order the Respondent to bargain with the Union regardless of the outcome of that election.

The Board has long recognized that good administrative practice decrees that it should not be profligate in the exercise of its functions and therefore it has adopted various safeguards to conserve its energies. Examples of these are the requirement of substantial showing of interest to support a petition and the refusal of the Board to proceed in cases where jurisdiction is present, but to assert it would not effectuate the policies of the Act. The requirement of a waiver before proceeding in a representation matter when a related charge has been filed is also a device of this sort. Similar to this is the firm practice of the Board to suspend the processing of a representation case when a related charge of refusal to bargain is filed. Waivers are not accepted in such cases as they are in situations where other unfair labor practices are concerned.[11] This practice is a recognition of the fact that inasmuch as a representation matter and a refusal to bargain proceeding are directed at the same end, it would not be consonant with good administration to allow both to be prosecuted at the same time. By waiting until after the election before filing its charges, the Union avoided this sound policy and caused the Board to engage in fruitless and expensive procedures. It is unimportant whether or not the

[11] Inasmuch as the majority does not deal with this question, it is not clear whether the Board is abandoning this practice or thinks that this case is distinguishable on the facts.

Union deliberately timed its filing of charges to avoid having action suspended on its representation petition. What is important is that the effectuation of an established Board policy should not be determined by the desire of a charging party as to when it will file its charge. The decision of the majority gives formal sanction to such a practice and can lead only to a diffusion and waste of Board processes.

For the foregoing reasons, I would dismiss that portion of the complaint which alleges an illegal refusal to bargain. In Case No. 1–RC–969, I would not dismiss the petition, but would process the challenged ballots in the usual manner.

Signed at Washington, D. C., May 2, 1951.

ABE MURDOCK,
Member.

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